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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1583

JIM L. NAPPER, ET UX.,

Petitioners,

v.

ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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August 25, 1975.

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To the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Fifth Circuit on original submission is reported at *500 F.2d 634*, and the opinion denying petitioners' motion for rehearing and for rehearing en banc is reported at *507 F.2d 723*. The opinion of the district court is not reported.

QUESTIONS PRESENTED

Petitioners had on file two identical tort actions against respondents, with identical allegations of diversity of citizenship — one action in a federal district court in Arkansas and the other, the

instant case, in a federal district court in Texas. Petitioners elected to litigate their claim of diversity in the Arkansas federal court, and, after a full hearing, the Arkansas federal court held that there was no diversity and remanded the case to Arkansas state court. Thereupon, petitioners, without attempting to allege any change of conditions or any new facts, tried to relitigate the same allegations of diversity in the Texas federal district court; in addition, they attempted to allege a ground of federal question jurisdiction and contended that pendent jurisdiction would attach to such allegation. The Texas federal district court dismissed petitioners' action, without prejudice, for want of federal jurisdiction.

After hearing oral argument, the Fifth Circuit affirmed. It held (1) that estoppel by judgment precluded petitioners from relitigating their diversity claim, which had been actually litigated and determined against petitioners in the Arkansas federal district court, (2) that petitioners had not alleged a tenable ground of federal question jurisdiction, and (3) that there was no pendent jurisdiction of petitioners' state law claim. Since petitioners do not dispute the second of these holdings — that they failed to allege federal question jurisdiction — the only issues presented are:

1. Having deliberately chosen to litigate diversity of citizenship in one federal district court, and such court having rendered judgment that there was no diversity, may petitioners go to another federal district court and, in an identical action, try to prove again the same allegations of diversity on the same facts against the same defendants, escaping any preclusive effect of the first judgment on the sole ground that such judgment, a remand order, was non-appealable?

2. Did petitioners' admittedly unfounded allegation of federal question jurisdiction provide a basis for pendent jurisdiction of petitioners' state law claim?

STATUTES INVOLVED

This case does not involve any statute or constitutional provision, either state or federal.

STATEMENT OF THE CASE

This is a common law damage suit alleging negligence and fraud, brought by petitioners, Jim L. Napper and his wife, in the United States District Court for the Northern District of Texas. The defendants, respondents, are the Dallas, Texas, law partnership of Anderson, Henley, Shields, Bradford & Pritchard and the individuals composing such partnership. (R. 5.)* Petitioners allege, essentially, that in January 1969 (more than two and one half years before this suit was filed on August 23, 1971), petitioners retained respondents to prepare mortgage instruments upon petitioners' homestead in Dallas, Texas, as security for petitioners' debt to one Johnson, and that petitioners negligently and/or fraudulently prepared the instruments to provide for an absolute conveyance rather than a mortgage. (R. 5-9, 36-48.)**

We are here concerned with petitioners' continuing efforts, unsuccessful in Arkansas federal court and unsuccessful in the courts below, to require the federal courts to take diversity jurisdiction of their action. Since it is undisputed that respondents are citizens of Texas, petitioners' claim of diversity is predicated on the contention that they, petitioners, are citizens of Arkansas, even though they admit that they were originally domiciled in Texas and that they have never settled in a permanent location in Arkansas, and further admit — indeed insist — that their homestead at all material times has remained in Texas.

Petitioners say in their petition for certiorari (p. 60), that

*References are to the original record.

**Confusingly interspersed throughout the petition for certiorari (see e.g., pp. 8-9, 13-14, "P.A." 16-21) are descriptions of fragmentary portions of petitioners' suit against Johnson, to which respondents are not parties.

"Speaking from the standpoint of essential justice, this is a type of case that deserves to be heard in a federal forum." Petitioners, however, did not initiate the case in a federal forum. Rather, they first undertook to maintain their action against these respondents — an action under Texas common law against a Texas law firm growing out of the preparation of Texas legal documents concerning Texas property — in a state court of Pulaski County, Arkansas (R. 81),* and they served respondents with process, in Texas, under the Arkansas "long-arm" statute. It was petitioners' theory that, even though respondents had never been physically present in Arkansas, the Arkansas courts could acquire "long-arm" jurisdiction over respondents because respondents, while in Texas, had mailed legal documents to petitioners and had given advice over the telephone to petitioners, who were then in Arkansas. (R. 71-73.)

The Arkansas suit, which had been filed on June 9, 1971, was removed by respondents to the United States District Court for the Eastern District of Arkansas, Western Division, on July 12, 1971, and, in said federal court, respondents filed a motion to dismiss the Arkansas suit on the ground that respondents were not amenable to the "long-arm" Arkansas service of process attempted by petitioners. (R. 28, 65.)

On August 23, 1971 — about six weeks after the Arkansas suit had been removed to federal court and before that court had taken any action — petitioners commenced the instant suit against respondents in the United States District Court for the Northern District of Texas, alleging the very same cause of action as in the pending Arkansas suit. (R. 5.) Petitioners' justification for keeping two identical suits on the dockets of two separate district courts is that the suit in the district court below was "a precaution" against petitioners' cause being dismissed in Arkansas, for

*We shall refer to that action as "the Arkansas suit."

want of long-arm jurisdiction, after the running of the statute of limitations. (Petition for certiorari, pp. 14-15.) Petitioners claimed jurisdiction of the Texas federal court solely on the ground of diversity of citizenship, it being alleged by petitioners that "Notwithstanding the fact that" their homestead was in Texas, petitioners had "established sufficient residence in the State of Arkansas to entitle them to invoke the diversity jurisdiction" of the Texas federal court. (R. 5; see Fifth Circuit opinion, *500 F.2d 636,* copied at p. "P.A." 10 of the petition for certiorari.) To this, on September 2, 1971, respondents filed a motion to dismiss for want of the alleged diversity jurisdiction. (R. 10.)*

On November 19, 1971, petitioners responded to the motion to dismiss with an affidavit, by which they sought to prove their allegation of Arkansas citizenship. Petitioners' affidavit stated that Dallas, Texas, had been their home until 1966 and that a house located on Emily Road in Dallas was and is their homestead; that petitioners had gone to Arkansas in 1966 when petitioner Mr. Napper went to work for a resort development there, and that they had voted, purchased automobile license plates, paid taxes, worked, and "had our children in school" in Arkansas "Since July of 1966"; the affidavit went on to say:

> "When we moved away from the house on Emily, we had not formed the definite intention of not returning to occupy such property as our home. To the contrary, we knew that resort developments were unstable communities. We knew that lot sales and construction usually die down after a short period of years. All of our friends and relatives are and were in and around Dallas, Texas. Neither of us have had stable, long-term employment in the State of Arkansas. Neither of us now has stable, long-term employment in the State of Arkansas. Mr. Napper is currently employed in

*It is admitted in the petition for certiorari (p. 8) that, by the time of the filing of this motion, September 2, 1971, limitations had run on petitioners' action. See p. 16 hereof for further discussion of limitations.

house remodeling — working from one job to the next — and Mrs. Napper is not employed." (O.R. 14.)

The affidavit concluded that petitioners had "never formed a definite intention of not returning" to their Texas homestead, but, to the contrary, wished to do so "whenever circumstances will allow us." (Ibid.)

At petitioners' request, the district court below, Judge Sarah T. Hughes, did not rule upon the jurisdictional question, or otherwise proceed with the case, but, rather, by pretrial order dated March 7, 1972, ruled that "At plaintiffs' request, the within cause of action will be held in abeyance pending a disposition of the motion to dismiss in the Arkansas litigation." (R. 16.)

While the instant case was thus being held in abeyance by Judge Hughes at petitioners' request, petitioners inaugurated strenuous efforts to convince the Arkansas federal court that it had acquired personal jurisdiction of respondents under the Arkansas "long-arm" statute. According to petitioners' "Appellants' Brief" in the Fifth Circuit (pp. 7-8), petitioners, in the Arkansas suit, "filed a request for production of documents and six separate sets of interrogatories," negotiated at length with respondents on a stipulation, and, on July 24, 1972, "submitted a 47-page brief, a 3-page answer, a 12-page amended complaint and a supplemental affidavit with two exhibits attached." By the amended complaint, petitioners specifically invoked the jurisdiction of the Arkansas federal court on grounds of diversity jurisdiction, presenting, for the first time in Arkansas, the same allegations of their citizenship as in their complaint in the Texas suit — i.e., that their homestead was in Texas but they were residents of Arkansas. (R. 67-68).* These same allegations, it will be recalled (p. 5 hereof),

*Since petitioners' original complaint in the Arkansas suit had been filed in state court, there of course were no specific allegations of federal jurisdiction in petitioners' original complaint.

had already drawn a motion to dismiss for lack of diversity jurisdiction in the Texas suit, almost a year earlier. Upon the filing of this amended complaint in the Arkansas suit, respondents filed a motion to dismiss that suit, as well, for want of diversity jurisdiction. (R. 65-66.)*

On May 9, 1973, the Arkansas federal court, Judge Eisele presiding, held a hearing in the Arkansas suit on the two jurisdictional questions before the court — i.e., diversity of citizenship and the "long-arm" service of process — but the "long-arm" matter was never reached. Petitioners personally testified at this hearing; and their testimony, as summarized by Judge Eisele in his oral findings of fact, without dispute from petitioners, was that they considered Dallas to be their home, that they had never settled in a permanent location in Arkansas, and that they wanted to return to Texas as soon as the litigation concerning their homestead was cleared up (R. 93-95) — in short, petitioners' testimony was substantially the same as that in their affidavit of November 19, 1971, in the instant suit, quoted at pp. 5-6 hereof.** After petitioners announced that had rested "on the diversity issue" (R. 91), Judge Eisele held that petitioners had failed to sustain their burden of proving that they had ceased to be citizens of Texas and had become citizens of Arkansas at the times in question — i.e., the date of the commencement of the suit (June 9, 1971) and the date of removal (July 12, 1971)

*Though styled a motion to dismiss, this, as will be seen below, was correctly treated by the Arkansas federal court as a motion to remand.

**One new fact revealed by petitioners' testimony in the Arkansas hearing was that petitioners had left Arkansas from November 1970 through the spring of 1971, during which period of time the family had gone back to Dallas and stayed there, with the children in school, while Mr. Napper sought work in Colorado. (R. 93.) It will be recalled that petitioners said in the November 19, 1971, affidavit that they had lived, worked, and had their children in school in Arkansas "Since June of 1966." (R. 14, quoted at p. 5 hereof.)

— and he remanded the case to Arkansas state court. (R. 64, 95.)*

It will be recalled (p. 9 hereof) that the reason petitioners had requested the district court below, in Texas, to hold its proceedings in abeyance, was as "a precaution against" an adverse ruling in Arkansas on the long-arm question. Of course, Judge Eisele did not rule upon the long-arm question, and that issue remained open for decision, on remand, by the Arkansas state court. But, on July 2, 1973, without waiting for any ruling from the Arkansas state court (and without dismissing the Arkansas suit either),** petitioners — who accuse respondents of "forum shopping" (petition for certiorari 58) — went back to the Texas federal court and unilaterally reactivated the instant case by issuing notices to take six depositions therein. (R. 3, 17-18.) Accordingly, on July 6, 1973, respondents renewed their motion to dismiss, calling the district court's attention to the Arkansas federal court's remand order and urging that it would be res judicata of petitioners' diversity allegations. (R. 17.)

Even then, the district court below did not proceed to dismiss the case; on the contrary, it gave petitioners another opportunity

*In their "Appellants' Brief" (p. 42), petitioners told the Fifth Circuit that they disagree with Judge Eisele's conclusion of law but do not disagree with his findings of fact. Petitioners' position, apparently, was and is that by removing the case to federal court (before petitioners filed the amended complaint described on p. 6 hereof), respondents, defendants, had judicially admitted to diversity jurisdiction. (See petition for certiorari 12.) Of course, as Judge Eisele recognized (R. 88), jurisdiction cannot be conferred on the federal courts by agreement, and a federal court is required to notice any jurisdictional question, either when properly raised by a litigant or on the court's own motion. *McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936).*

**It was not until November 15, 1973, that the Arkansas state court ruled that petitioners had failed to sustain long-arm jurisdiction over respondents. Petitioners then attempted an appeal to the Arkansas Supreme Court, but the appeal was dismissed for failure to comply with the applicable time limits. This Court denied certiorari in the Arkansas suit on November 18, 1974. *419 U.S. 1023 (1974).* (See petition for certiorari, p. 13.)

to allege and prove that they were citizens of Arkansas as of the date the instant suit was filed (August 23, 1971), and petitioners filed a supplemental affidavit on August 27, 1973, and an amended complaint on September 19, 1973. (R. 23-24, 36-37.) These did not even suggest any facts tending to show that petitioners' situation on August 23, 1971, was any different from their situation at the time of their filing of the Arkansas suit on June 9, 1971, or the removal thereof to federal court on July 12, 1971 — indeed, far from alleging any such factual changes, petitioners' allegations in the amended complaint, with respect to their citizenship, were the same as those in the amended complaint in the Araknsas suit (and the same as those in the original complaint in the instant suit).*

In addition to diversity, the amended complaint below, for the first time either in Texas or in Arkansas, attempted to invoke "federal question" jurisdiction. It was alleged that inasmuch as some of respondents' purportedly false representations, upon which petitioners had predicated the suit, were made over the long distance telephone by respondents in Dallas to petitioners in Arkansas, respondents thereby had violated *18 U.S.C. §1343,* which imposes a $1,000.00 fine or five years' imprisonment, or both, upon anyone who transmits false or fraudulent representations by means of interstate wire, radio, or television. (R. 36.) On this basis, petitioners claimed the right to bring a private civil suit against respondents for damages, in federal court, on account of such alleged criminal conduct. Also, petitioners argued in a supporting brief that this supposed private federal civil cause of action would sustain pendent jurisdiction of their case insofar as the acts complained of amounted to common law fraud.

The district court dismissed the action, without prejudice, for want of jurisdiction. It held that the Arkansas remand order was res judicata as to petitioners' citizenship on June 12, 1971 (the

*Petitioners said in their "Appellants' Brief" in the Fifth Circuit (p. 20), "We cannot conceive what 'factual changes' could be stated."

date of removal) and that petitioners had not shown any change of facts since that date, although afforded ample opportunity to do so; and it held that *18 U.S.C. §1343* is a purely criminal statute, which does not give rise to a private civil cause of action. (See petition for certiorari, pp. "P.A." 2-8, where such opinion is copied.)

The Fifth Circuit, after accepting four briefs from petitioners, and hearing oral argument, affirmed on the same grounds as the district court. *(500 F.2d 634,* copied at petition for certiorari, pp. "P.A." 8-13.) Petitioners filed a petition for a rehearing and rehearing en banc, in which, although they abandoned the allegation that *18 U.S.C. §1343* gives rise to a private civil cause of action, they contended that such allegation nevertheless would afford a basis for pendent jurisdiction. The Fifth Circuit denied the petition with a written opinion. *(507 F.2d 723,* copied at petition for certiorari, pp. "P.A." 14-15.)

ARGUMENT

Petitioners would have this Court grant certiorari to consider their attempt to require the federal courts to hear their fraud case on theories of (1) diversity of citizenship and (2) pendent jurisdiction. We shall comment on these in the order just stated.

I. Diversity

"The principles of res judicata apply to questions of jurisdiction as well as to other issues." *American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932);* see also, *Acree v. Air Line Pilots Association, 390 F.2d 199, 203 (5 Cir., 1968), cert. den., 393 U.S. 852 (1968); Stuhl v. Tauro, 476 F.2d 233 (1 Cir., 1973).* The usual statement of the doctrine is that it consists of two branches: direct estoppel, which applies when the second action is identical to the first, and collateral estoppel, when the causes of action are different but some of the issues are the same, the important difference being that direct estoppel bars relitigation not only of issues which were tried in the former suit but also issues which could have been tried but were not, whereas collateral estoppel only precludes relitigation of issues that actually

were tried. *Commissioner v. Sunnen, 333 U.S. 591, 597-598 (1948).* Under either branch of the doctrine, "matters which were actually litigated and determined in the first proceeding cannot later be relitigated." *Ibid.* Our case, in all respects, comes squarely within the operation of res judicata. The two suits were identical, the matter at issue in the second suit, diversity of citizenship, was actually litigated and determined in the first suit — indeed, formed the sole basis for the judgment therein — and petitioners, in the second suit, were attempting to relitigate the matter on precisely the same allegations and evidence which had been found wanting by the judgment in the first suit.

Petitioners do not deny that their claim of diversity was fully litigated in the Arkansas federal court. They do not suggest that they have or ever have had anything to add to the evidence presented there. What they want this Court to hold is that res judicata does not apply because, and only because, the judgment of the Arkansas federal court, a remand order, was not appealable. In rejecting this contention, and holding that "As between the two federal district courts, the inability to appeal from the order of remand does not permit the issue actually litigated and determined in the federal court in Arkansas to be relitigated in the second action" *(500 F.2d 636-637,* copied at petition for certiorari, p. "P.A." 13), the Fifth Circuit has followed the prevailing law, which includes two expressions on the point by this Court. *Johnson Company v. Wharton, 152 U.S. 252, 261 (1894); United States v. Munsingwear, 340 U.S. 36, 38-39 (1950); Anderson v. Patterson, 189 Va. 893, 55 S.E.2d 1, 4 (1949); Freeman on Judgments, §339 (5 Ed., 1920); 157 A.L.R. 1038, 1039 (1945); Moore, Federal Practice, ¶0.416[5] (1974).**

*We confess to a total inability to understand how petitioners could contend that the "implications" of *United States v. Munsingwear, 340 U.S. 36 (1950),* are that *Johnson Company v. Wharton, 152 U.S. 252 (1894),* should be overruled. (See petition for certiorari, pp. 25-26.) On the contrary, *Munsingwear* expressly recognizes the authority of *Johnson Company v. Wharton.* See *340 U.S. 38-39.*

Petitioners argue that the present case is controlled, not by the foregoing authorities, but by a section of the Tentative Draft of the second Restatement of Judgments. The Tentative Draft divides the operation of res judicata into "claim preclusion" and "issue preclusion," and, as to "issue preclusion," it proposes that relitigation of an "issue" should be permitted if "The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action." *Restatement of Judgments 2d, §68.1 (Tent. Dr. No. 1, 1973).* Petitioners would have this Court grant certiorari to hold that, under this proposed §*68.1*, petitioners may try again in Texas federal court to establish diversity of citizenship on the same facts and allegations which caused the Arkansas federal court to rule against them by its remand order.

Petitioners are asking this Court to adopt, and decide this case under, one section out of a tentative, unfinished document; the second Restatement of Judgments is far from complete, and no part of it has been finally approved by the ALI membership.* But, apart from that, and taking the proposed §*68.1* as stating a presently definitive rule, we find nothing in §*68.1* that would require the Fifth Circuit and district court below to allow petitioners to shuttle their diversity claim between the federal courts of Arkansas and Texas.

To begin with, it is to be noted that §*68.1* applies only to cases

*To date, out of the projected five chapters, only Chapter 3 and Chapter 4, Topic 1, are even in tentative form. Tentative Draft No. 1, which covers Chapter 3 (sections 41 through 76) was debated for three hours at the ALI's 1973 meeting. At the conclusion of the discussion, which did not reach §*68.1*, it was resolved that "subject to the comments and suggestions which have been made * * * this body agrees in principle with the general scheme of what has been presented thus far this morning." *Proceedings, 50th Annual Meeting, American Law Institute, 1973, pp. 260-338 (1974).*

of "issue preclusion."* Petitioners attempt to come within §*68.1* by contending, if we understand them, that "claim preclusion" applies only when the judgments are identical, and that "issue preclusion" is involved here because, although the facts and pleadings were the same, the parties the same, and the ruling (no diversity jurisdiction) the same, the type of judgment rendered by the Arkansas federal court (a remand order) was different from that of the Texas federal court (dismissal without prejudice). (See petition for certiorari, pp. 35-41.) Of course, it will be many years, if ever, before any clear line of demarcation between a "claim" and an "issue" has evolved, but we know of nothing in the Tentative Draft or elsewhere to support the distinction attempted by petitioners. On the contrary, the Tentative Draft, at present, defines a "claim" as a "litigative unit or entity which may not be split," whereas an "issue" is one of the elements of a cause of action or defense, see *Restatement of Judgments 2d, pp. 80-81, 147-148 (Tent. Dr. No. 1, 1973),* and, on that basis, it would seem that diversity of citizenship, in the Arkansas federal court, was a "claim": not only was it a "litigative unit," it was the entire subject matter of the Arkansas federal court's judgment, the remand order. Certainly it was more than a mere "issue."**

Even if petitioners could overcome that hurdle, however, it still does not follow that the proposed §*68.1*, when and if adopted, should be held to apply to remand orders of a federal district court. It has long been established that remand orders, though non-appealable, are final and conclusive; after a case has been remanded, it may not be removed to federal court again on the

*Petitioners admit that "Certainly, non-appealability does not affect the judgment's vitality as a *claim preclusion* * * * ." (Petition for certiorari, p. 26, emphasis petitioners'.)

**In fact, jurisdiction ordinarily is treated as a "litigative unit" for res judicata purposes; a dismissal for lack of jurisdiction does not affect the merits, but is res judicata as to jurisdiction. *Acree v. Air Line Pilots Association, 390 F.2d 199, 203 (5 Cir., 1968), cert. den., 393 U.S. 852 (1968).*

same grounds. *St. Paul & Chicago Railway Co. v. McLean, 108 U.S. 212, 217 (1883); Moore, Federal Practice, ¶0.169[3] (1974).* If §68.1 means that remand orders are to have no preclusive effect, this would allow their finality to be circumvented simply by filing the same suit in another federal court. Professor Vestal has remarked recently that "the courts have revealed a willingness to expand the preclusive impact of litigation on issues in subsequent suits and thus save the time of the courts." *Vestal, "Res Judicata/Preclusion: Expansion," 47 So. Cal. L. Rev. 357, 359 (1974).* There is nothing to indicate that §68.1 was designed to thwart this wise policy by permitting continual relitigation of the subject matter of remand orders — particularly a remand order based upon a finding, after full hearing, that there was no diversity of citizenship.

Nor do we believe that §68.1 was intended to apply, as petitioners would have it apply here, to permit one to nullify an adverse judgment on a question which he has fully litigated, on his own volition, in the forum of his choice. Petitioners had on file the same cause of action, with the same allegations of diversity, in two federal district courts — Arkansas and Texas — and could have tried the case in either forum. They knew a ruling of no diversity in Arkansas federal court would take the form of a non-appealable remand order, but, in the Texas federal court (where the action had been filed by petitioners as a "precaution") would be an appealable order of dismissal. Having convinced themselves that the Arkansas federal court "was going to sustain long-arm jurisdiction" (see petition for certiorari, p. 58), thus affording petitioners the advantage of suing respondents in a foreign state, petitioners were willing to have diversity litigated in that court as well — indeed, they amended their Arkansas complaint to include the same diversity allegations they had on file in Texas, even though they knew those allegations had already been challenged in Texas by respondents. (See pp. 6-7 hereof.)

After affording petitioners a full and fair hearing, allowing them to present all the evidence they had or ever will have on diversity, the Arkansas federal court ruled against them. Now, petitioners want this Court to hold that the proceeding on diversity in Arkansas, in the federal district court of petitioner's first choice, was purely academic, a moot court trial, because the court's judgment is non-appealable; petitioners say this gives them the right to go to Texas, to the federal district court of their second choice, and relitigate the same allegations of diversity on the same facts. Petitioners ask this Court to use this case as a vehicle for promulgating "a modern, realistic, flexible, common-sense view of the law of prior adjudication." (Petition for certiorari, pp. 51-52.) We submit that, in holding that petitioners have had ample opportunity to present their claim of diversity, the courts below have fully satisfied these standards.*

Before leaving this matter of diversity, we should make two additional observations.

First, it is to be remembered that the judgment of the district court below, affirmed by the Fifth Circuit, was a dismissal without prejudice; it has no effect on the merits. The petition for certiorari complains (pp. 8, 35, 58) that, since the date of the alleged tort, January 25, 1969, petitioners have sued respondents "in an endless succession of courts" without the merits ever being reached, but the reason for this is that the courts chosen by peti-

*In this connection, petitioners have made it clear that if the courts below are reversed and the Texas federal court directed to hear petitioners' diversity claim, the evidence will be the same as that presented to the federal district court in Arkansas. (See p. 9 hereof.) One wonders why petitioners think one federal judge would view this evidence any differently than another. Moreover, the decision of the Arkansas federal court, that petitioners had not acquired a domicile in Arkansas — based on findings of fact not challenged by petitioners — is in accord with the Fifth Circuit decisions. See *Mas v. Perry, 489 F.2d 1396, 1400 (5 Cir., 1974), cert. den., 419 U.S. 842 (1974).*

tioner have been, uniformly, without jurisdiction. Petitioners will have every opportunity, to establish whatever case they have, any time they abandon their steadfast determination not to pursue their grievance against respondents in a forum where jurisdiction would be unquestioned — i.e., any one of the fourteen district courts of Dallas County, Texas, where respondents have their domicile, and where, according to every court which has considered the subject, petitioners have their domicile also.*

Secondly, we should take note of petitioners' assertion that we will plead limitations if they do file their case in Texas state court. (Petition for certiorari, p. 58.) We will indeed, but petitioners' limitations problem will be no less serious if the case should remain in federal court. In Texas, damage suits for negligence and fraud are governed by the two year statute of limitations. *Article 5526, Texas Revised Civil Statutes.* Since, petitioners say, the alleged tort occurred in January 1969 (ibid., p. 8), and this suit was filed in the district court below on August 23, 1971, it is, prima facie, time barred. If petitioners should contend that there is some basis for tolling the statute, the burden of proof will be theirs, *Nichols v. Smith, 507 S.W.2d 518 (Tex. Sup., 1974); Redburn v. Shield, 338 S.W.2d 323, 325 (San Antonio Civ. App., 1960), writ dismissed,* and the burden will be difficult — particularly since petitioners have admitted (petition for certiorari, p. 8) that limitations had run as of September 2, 1971, only ten days after the filing of the suit.

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*Of course, petitioners say that they cannot get a fair trial at the Dallas County Courthouse (petition for certiorari, p. 59), but this seems to be their problem everywhere. Note, for example, their heavy-handed effort to imply that, even in a forum as far removed from Dallas as the United States District Court for the Eastern District of Arkansas, the judge, in remanding their case to state court, was motivated by "subtle influences" and a "temptation" to clear his docket of petitioners "sticky" litigation. (See petition for certiorari, p. 31.)

II. Pendent Jurisdiction

In their amended complaint in the district court below, filed on September 25, 1973 (more than two years after the commencement of the suit, almost five years after the date of the alleged tort), petitioners, for the first time, attempted to invoke "federal question" jurisdiction — their allegation being that respondents, pursuant to the alleged fraud, had made false statements to petitioners over the interstate telephone in violation of the federal criminal wire fraud act, *18 U.S.C. §1343.* (R. 36.) Petitioners' theory was that this supposed violation operated to create in petitioners a federal cause of action against respondents for damages. The courts below rejected this theory on the pleadings; they ruled, as said by the Fifth Circuit, that *18 U.S.C. §1343* is "purely penal" and does not "grant additional federal question jurisdiction in civil cases." *(500 F.2d 636,* copied at petition for certiorari, p. "P.A." 12.) This holding is clearly correct, *Cort v. Ash, — U.S. —, 95 S. Ct. 2080, 2089-2091 (1975); Oppenheim v. Sterling, 368 F.2d 516 (10 Cir. 1966), cert. den., 386 U.S. 1011 (1967),* and, in any event, *is not challenged by petitioners.*

Petitioners contend, however, that even though their pleadings admittedly do not raise a federal question, the district court nevertheless should have retained this case — a common law negligence/fraud action — on grounds of "pendent" jurisdiction. The Fifth Circuit's opinion on rehearing completely answers this argument, as follows:

> "The amended complaint * * * sought recovery also on a claimed federal cause of action which we held to be nonexistent. There was never any basis of federal jurisdiction sufficient to support pendent jurisdiction of the state law claim." *(507 F.2d 723,* copied at petition for certiorari, p. "P.A." 15.)

See *United Housing Foundation, Inc. v. Forman, — U.S. —, 95 S. Ct. 2051, 2064 (1975).*

CONCLUSION

Petitioners' allegations of diversity were decided against them by the forum of their choice, and they did not even try to show any new facts which would permit them to relitigate their diversity claim in the district court below. Petitioners' belated attempt to raise a federal question, admittedly without substance, provided no basis for pendent jurisdiction. Accordingly, the judgment of the district court, affirmed by the Fifth Circuit, dismissing petitioners' action without prejudice for want of federal jurisdiction, is right. Petitioners have shown nothing, and there is nothing, which would merit review by this Court.

Respectfully submitted,

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